Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 8, 2001

QUESTION PRESENTED FOR REVIEW

Does respondents' policy, which continues a tradition of permitting student-led prayers at public high school graduations, violate the Establishment Clause of the First Amendment, where the decision on whether to have a prayer or other message is made by a student referendum and where, in practice, a substantial majority of such messages are in fact prayers?

LIST OF PARTIES TO THE PROCEEDING[1]

The petitioners, past and current students of respondents' public school system, and parents of minor students, are:

Emily Adler
Bonnie Bear
Aaron Finck
Benjamin Finck
Rachel Finck
Seth Finck
Tyler Hurley
Monica Juodvalkis
Lucy Nord
Roberta Nord
Jonathan Rand
Joshua Weihnacht

Petitioners' request for class certification was not ruled upon below.

Respondents are the Duval County School Board and Duval County Public School District, which operate the public school system in Jacksonville, Duval County, Florida.

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[1]A group of individuals sought to intervene in support of the respondents. Their motion to intervene was denied as moot by the district court and their intervention status was not addressed by the Court of Appeals. These persons are as follows: Rebecca Boles, Ronald Boles, Susan Boles, Ashton Carkhuff, Karlene Carkhuff, Kenneth Carkuff, Sarah Carter, Stan Carter, Susan Carter, Eric S. Hurst, Phillip R. Hurst, Mark Muhlbauer, Charlotte R. Pigg, Douglas D. Pigg, Jonathan D. Pigg, Jody Sciullo, Mark Sciullo, Moriah Sciullo, Nicholas Sciullo, H. Nelson Sturgill, and Kathy C. Sturgill.

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on May 11, 2001.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals after remand by this Court appears at App. 1a-48a of this Petition and is published at 250 F.3d 1330. The court's previous *en banc* opinion appears at App. 49a through 139a and is published at 206 F.3d 1070. The panel opinion of the Court of Appeals

appears at App. 140a through 224a and is published at 174 F.3d 1236. The unpublished order of the district court appears at App. 225a-228a. A previous opinion of the district court relating to the same policy of respondent, and adopted by the district court in this case, appears at App. 229a through 256a and is published at 851 F.Supp. 446.

JURISDICTION

Following a timely petition for writ of certiorari, this Court granted certiorari, vacated the prior *en banc* opinion of the Court of Appeals and remanded for reconsideration in light of the decision in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). *See Adler v. Duval County Sch. Bd.*, ___ U.S. ___, 121 S.Ct. 31, 148 L.Ed.2d 3 (2000). The Court of Appeals rendered its *en banc* opinion on remand on May 11, 2001. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (2001). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND RESPONDENTS' POLICY INVOLVED

This case requires interpretation and application of the First Amendment to the Constitution of the United States. The First Amendment provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof....

Respondents' policy at issue, entitled "GRADUATION PRAYERS," is reprinted in full at App. 267a-268a.

STATEMENT OF THE CASE

Invocations, benedictions and other prayers or religious messages traditionally have been offered at Duval County, Florida, public high school graduation ceremonies. *See* App. 246a n.9; *Adler I*, 851 F.Supp. at 453 n. 9. However, following the Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), the respondents' legal affairs officer promulgated a July 22, 1992 policy that "there should be no prayer, benediction, or invocation at any graduation ceremonies" pursuant to *Lee*. App. 52a n.1; *Adler IV*, 206 F.3d at 1071 n.1. During the ensuing academic year, following pressure from various interest groups and individuals seeking to ensure continuation of prayer at graduations, the respondents' superintendent, as he later testified, determined "that it would be appropriate for students themselves at commencement to perform in the way of developing, administering, delivering the prayer at commencement." Deposition of Larry Zenke at 10-11.

Respondents' legal affairs officer then promulgated a May 5, 1993 policy entitled "Graduation Prayers," the policy at issue in this case, which delegates to the "senior class as a whole" to decide whether "a brief opening and/or closing message, not to exceed two minutes" would be given at graduations and, if so, which student would be chosen to deliver the "message." App. 267a-268a. The policy, reprinted in full at the end of the appendix to this Petition, App. 267a, was premised on its face on a contention that its procedures were lawful, despite *Lee*, in view of a Fifth Circuit opinion, not cited but acknowledged to be *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). App. 267a. The policy explains that its "purpose...is to give you [high school principals] some guidelines on this issue" of "whether or not student initiated and led prayers are acceptable" at graduation following *Lee*. App. 267a. On June 1, 1993, the respondent Duval County School Board rejected a proposed alternative

policy that would have substituted a moment of silence for the "Graduation Prayers" policy. App. 54a-55a; *Adler IV*, 206 F.3d at 1072. As one board member remarked during the debate, "[I]n good conscience I cannot vote [in favor of] silent meditation when we all know that in the past someone has prayed out loud to thank the Lord...." App. 38a; *Adler V*, 250 F.3d at 1346 n.3 (Kravitch, J., dissenting).

Pursuant to the policy, each high school's senior class or senior class officers vote in elections administered by the school administration and faculty to select a student to deliver the "message" or "messages." Votes often have been taken on the specific issue of whether to include prayer at graduation, and most frequently the speaker selected at most schools has been a previously elected class "chaplain."[1] In programs printed by respondents, graduates and audience members are directed to stand during explicitly labeled invocations and benedictions, as well as other less explicitly labeled messages, which, since enactment of the policy, have most often constituted prayers. *See* App. 262a -266a (summary of printed programs).[2] The audience is directed to stand for "messages"

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[1]The senior class chaplain is elected at the beginning of the academic year along with other class officers. The record does not reveal the other duties of the chaplain, if any. While the existence of a senior class chaplain may raise constitutional questions, that issue is not raised in this case.

[2]This is a table summarizing printed programs of numerous graduation exercises from 1994 through 1997 with respect to the description in the programs themselves of the "messages" delivered pursuant to the challenged policy and of the chosen speaker. The programs were obtained pursuant to Florida public records law prior to the filing of the lawsuit in this case. These programs, properly authenticated, were filed as exhibits in support of petitioners' motion for preliminary injunction in the district court, and this tabulation was furnished to both the district court at the hearing on that motion and the Court of Appeals as an appendix to petitioners' *en banc* reply brief. The respondents' production of materials in response to the pre-suit public records request did not include materials for all 17 high schools or for all years involved. Because the district court consolidated trial on the merits with the hearing on the motion for preliminary injunction pursuant to Fed.R.Civ.P. 65(a)(2), the record is not

delivered pursuant to the "Graduation Prayers" policy, but not for most other portions of the program, including the only other student speech by the valedictorian. *See* App. 115a-116a & n.7, 127a-128a & nn. 15-17, 137a & nn. 29-31; *Adler IV*, 206 F.3d at 1097 & n.7, 1102 & nn. 15-17, 1105-06 & nn. 29-31 (Kravitch, J., dissenting).

The petitioners seek declaratory, injunctive and damages remedies for violations of their rights under the Establishment Clause of the First Amendment by the adoption and implementation of respondents' "Graduation Prayers" policy for the 17 high schools of the Duval County, Florida, public school district. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§1331 and 1343(a)(3), and 42 U.S.C. §1983. The district court consolidated a hearing on petitioners' motion for preliminary injunction with trial on the merits, denied preliminary injunctive relief and entered final judgment for the respondents on the basis of its previous summary judgment in *Adler v. Duval County Sch. Bd.*, 851 F.Supp. 446 (M.D. Fla. 1994) *("Adler I"), aff'd in part, vacated in part*, 112 F.3d 1475 (11th Cir. 1997) *("Adler II")*.[3] App. 225a-228a. The district court took judicial notice of the *Adler I* record, which it consolidated with the record in this case. *See* App. 226a n.2.

The district court adopted its 1994 order on cross motions for summary judgment in *Adler I*. App. 227a. *See*

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flush with the results of discovery. Even this limited record, however, leaves no doubt of predominance of prayer as a result of the policy from 1994 through 1997. Respondents have never argued or produced evidence to the contrary.

[3]In *Adler II*, the Court of Appeals, after two arguments before different panels, did not address the constitutional merits but rather found equitable claims moot and damages claims waived. Even though the last name of the lead plaintiffs in all of these cases is the same, the case resulting in the *Adler I* and *Adler II* decisions involved students other than those who brought this case.

App. 229a, 190a; *Adler I*, 851 F.Supp. at 446. The district court concluded that respondents' policy does not violate the First Amendment, in critical part because of the student election mechanism and because of its conclusion that graduation ceremonies are limited public fora. App. 247a-248a; *Adler I*, 851 F.Supp. at 453-55. The district court also distinguished the case from this Court's decision in *Lee* on the basis of the rationale of *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). App. 251a-252a; *Adler I*, 851 F.Supp. at 455-56.

A panel of the Court of Appeals reversed the district court. App.140a; *Adler III*, 74 F.3d 1236. But the *en banc* court found that the "Graduation Prayers" policy "insulates" resulting prayers from state action because of the student vote mechanism. App. 63a-80a; *Adler IV*, 206 F.3d at 1075-84. The *en banc* majority also analogized the circumstances to those warranting a public forum analysis, App. 66a-67a & n.6; 206 F.3d at 1077-78 & n.6, and found the voting mechanism constitutionally neutral, App. 77a-82a, 206 F.3d at 1082-83. The majority below further concluded that the policy passes scrutiny under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 82a-99a; *Adler IV*, 206 F.3d at 1084-1090.

This Court granted certiorari, vacated the *en banc* judgment below and remanded for reconsideration in light of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). *Adler v. Duval County Sch. Bd.*, ___ U.S. ___, 121 S.Ct. 31, 148 L.Ed.2d 3 (2000). On remand from this Court, the majority below reinstated its previous *en banc* judgment and concluded that this case is "fundamentally different" from *Santa Fe* because of its belief that the student speech resulting from the Duval County policy does not constitute state action, prayer is not necessarily the only possible result of the policy's application on every occasion, and legitimate secular purposes exist for the policy. App. 9a, 24a-29a; 250 F.3d at 1334, 1340-42.

Four judges dissented on remand, concluding that the only differences between this case and *Santa Fe* are immaterial to the outcome, other than the fact that student attendance at graduations is *more* compulsory than attendance at football games, rendering a policy of prayer at graduations *more* offensive to the Establishment Clause. App. 30a, 41a; 250 F.3d at 1342 (Kravitch, J., dissenting); *id.* at 1347 (Carnes, J., dissenting). The initial *en banc* dissenting judges concluded that the student vote, and its results, are attributable to the state, that the strictures of the policy promote invocation and benediction prayer in a highly controlled school environment, that majority voting on the issue is not constitutionally neutral and that the preeminent purpose and primary effect of the policy are to advance and endorse religion. App. 101a-129a; 206 F.3d at 1091-1106 (Kravitch, J., dissenting). As the dissent observed, almost all of the printed graduation programs prepared by respondents for ceremonies from 1994 through 1998 utilize the terms "invocation" and "benediction" to identify the "messages," and most identify the student speaker selected by majority vote as the senior class "chaplain." App. 182a n.17, 137a n.31; 206 F.3d at 1102 n.17, 1106 n.31 (Kravitch, J., dissenting). The dissent concluded:

> [T]he policy encourages the delivery of a prayer during a stage of the graduation ceremony when the content seems most "official" and when officials' control over audience participation is at its highest....
>
> Moreover, the policy utilizes the vote to further its purpose, and in so doing corrupts the most cherished of democracy's tools. For the government cannot delegate the authority to do what it could not do itself, and constitutional rights are not subject to the whims of an electoral majority.

App. 138a-139a; 206 F.3d at 1106 (Kravitch, J., dissenting).

Judge Kravitch, joined in dissent on remand by Chief Judge Anderson and Judges Carnes and Barkett, also found that the majority had not followed *Santa Fe*'s command to consider the history and context of the policy, had ignored significant portions of the written policy itself, and had failed to recognize that majoritarian decisionmaking under the policy renders the resulting speech attributable to the state. App. 30a-40a; 250 F.3d at 1342-47. Judge Carnes, joined by Chief Judge Anderson and Judge Barkett, wrote separately to emphasize the coercion, state endorsement and absence of neutrality inherent in majority rule on the policy's clear subject matter of prayer at graduation. App. 41a-48a; 250 F.3d at 1347-50.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of significance throughout the United States regarding prayer at public high school graduation exercises. The *en banc* majority opinion below conflicts with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), and wrongly approves a clearly pretextual attempt to circumvent *Lee v. Weisman*, 505 U.S. 577 (1992). Additionally, the Courts of Appeals have reached conflicting conclusions on the issue in the wake of *Lee*.

1. The Court of Appeals' majority opinion cannot be reconciled or harmonized with this Court's decision in *Santa Fe*. The Duval County policy is no more neutral than Santa Fe's. Student prayer from the graduation podium pursuant to a state policy of majoritarianism is more coercive, and more imbued with state endorsement, than prayer at football games because of the greater compulsion for students to attend their high school graduation exercises. *See Santa Fe*, 530 U.S. at 311-12. The decision below also contravenes *Santa Fe* by utterly disregarding the Duval County policy's history and context in

failing to recognize that the clear purpose of the challenged policy is to preserve a tradition of prayer at graduation, attempting to hide behind a thin veil its actual purpose and causative effects.[4] *Id.* at 307-09, 315-16. The decision below conflicts with the Court's decision in *Santa Fe* on an important question of constitutional law which, absent review by the Court, will continue to recur throughout the nation. Accordingly, the Court should grant review in this case.

This case involves delegating a state-assisted, exclusive opportunity to speak to the outcome of government-sponsored student referenda. This delegation of state power not only fails to separate the state from what results, but may heighten the constitutional offense, particularly the reasonable perception of state endorsement of the results. Issues of fundamental constitutional rights may not be determined by majority vote. *Santa Fe*, 530 U.S. at 304-305; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The First Amendment precludes a majority from using "the machinery of the state to practice its religious beliefs." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). Any state delegation of power to a religious majority must foreclose religious favoritism and require neutrality. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706, 709-10 (1994). Majority determinations do not provide constitutional viewpoint neutrality. *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

The dissents below are fully consistent with the precedents of this Court in concluding that the referenda pursuant to the Duval County policy fail to separate the

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[4]The importance of considering the history and context of the state action challenged under the Establishment Clause is hardly new. For example, a state-created moment of silence in public schools, seemingly neutral on its face, failed to withstand attack where the record established that its purpose was to continue a tradition of prayer in schools despite previous decisions of this Court. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

resulting religious speech from state action and fail to constitute neutral selection criteria. *Santa Fe*, 530 U.S. at 305-08. Even where application of the policy might not result in a 100 percent rate of compelled student participation in religious worship, a policy enacted with the purpose and perception of school endorsement of student prayer violates the Constitution simply upon enactment. *Id.* at 314-16. The judgment below in this case contravenes these holdings of the Court.

The decision of the Eleventh Circuit also conflicts with this Court's principal holdings in *Lee v. Weisman*, 505 U.S. 577 (1992). The Court in *Lee* reiterated the constitutional prohibition of majority rule in matters implicating the Establishment Clause. *Id.* at 596. A *Lee* analysis demonstrates that respondents' policy results in state coercion of student participation in religious exercises by the state-sponsored majoritarian decisionmaking and the essentially required nature of attendance at a high school graduation which is controlled by the state. *See id.* at 592-94.

The Court of Appeals' majority read state control of graduations, found in *Lee*, out of any existence in this case and failed to address the prohibition on state coercion of participation in religious exercises. *See Lee*, 505 U.S. at 599; App. 113a-116a; *Adler IV*, 206 F.3d at 1096-97 (Kravitch, J., dissenting). The majority below also failed to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971), properly by ignoring the material facts. By contrast, the dissents were based on consideration of the record and correct application of controlling law. "The dominant reason for its [the policy's] passage was to keep prayer in graduation ceremonies," and the policy on its face betrays its preeminent purpose to advance religion, with secular justifications nothing more than insincere rationalization or mere incidental effects. App. 118a-119a; *Adler IV*, 206 F.3d at 1098 (Kravitch, J., dissenting). Additionally, the Court of Appeals' majority overlooked the

policy's "preference for religious expression despite the seeming neutrality of its terms," rendering its primary effect one of advancing or endorsing religion. App. 127a; 206 F.3d at 1101 (Kravitch, J., dissenting), *citing, inter alia, County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Moreover, the majority below erred in even drawing an analogy to the public forum doctrine because graduation ceremonies have never been considered public fora, and a public forum is not created by allowing a student majority to elect a single speaker. *Santa Fe*, 530 U.S. at 302-03; App. 130a-133a; *Adler IV*, 206 F.3d at 1103-04 (Kravitch, J., dissenting); *ACLU of New Jersey v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471, 1478 (3rd Cir. 1996) *(en banc); Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 838 (1998), *vacated as moot*, 177 F.3d 789 (9th Cir. 1999) *(en banc); Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 418 (5th Cir. 1991), *vacated on other grounds*, 505 U.S. 1215 (1992).[5]

As did the school district in *Santa Fe*, the majority opinion below

> [a]sks us to pretend that we do not recognize what every [Duval County] high school student understands clearly - - that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a [graduation ceremony] and that this [policy] is essential to the protection of students' speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing prayer.

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[5] Even in a limited public forum, participation determined by majority vote is unconstitutional. *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

> Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.

Santa Fe, 530 U.S. at 315-16. The policy does not require or even suggest that the "messages" must be solemn. Respondents' policy creates and fosters a divisive majoritarian electoral process through which "[a]ll the majority has to do to ensure that a religious message is delivered at graduation is select as its messenger one whom it can rely upon to give such a message. There is no reason at all to believe that will be difficult to do." App. 44a; *Adler V*, 250 F.3d at ___ (Carnes, J., dissenting).

2. In limiting its grant of certiorari in *Santa Fe* to the issue of prayers at public high school football games pursuant to student referenda, the Court in essence denied review of the Fifth Circuit's disposition of the issue of prayers at graduation exercises pursuant to such referenda. The Eleventh Circuit's *en banc* decision in this case conflicts with and specifically rejects the Fifth Circuit's decision in *Santa Fe* on the issue of prayer at graduation. *See* App. 70a-72a n.7; *Adler IV*, 206 F.3d at 1079 n.7. In *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 819 (5th Cir. 1999), the court invalidated a policy under which students voted whether an invocation and benediction would be given at graduation and, if so, which students would deliver them. *Id.* at 812. The Fifth Circuit concluded that the policy lacked a secular purpose and had the primary effect of advancing and endorsing religion because it failed to prohibit sectarian and proselytizing prayers. *Id.* at 818. This Court declined review of that holding. ___ U.S. ___, 120 S.Ct. 494, 145 L.Ed.2d 381.

The opinion below also conflicts with the Third Circuit's decision in *ACLU of New Jersey v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996) *(en banc)*, invalidating a policy allowing prayer at graduations pursuant

to student vote. In *Black Horse Pike*, school officials adopted a policy entitled "religion at graduation exercises" which allowed students to decide by majority or plurality whether to have a student volunteer to deliver a prayer, whether to have a moment of reflection or whether to do nothing at all, and required that printed programs disclaim any connection with any presentation that may result during the high school graduation ceremonies. *Id.* at 1475. The Third Circuit rejected the school board's argument that the referendum rendered the issue a matter of free speech rather than one of state establishment of religion. *Id.* at 1477. "[W]e fail to see how this particular policy, addressed only to providing an option for continuing prayer at graduation after *Lee*, can be legitimized as promoting the free speech rights of the students." *Id.* at 1478. The *Black Horse Pike* court rejected the Fifth Circuit's *Jones* decision, found that the policy was enacted with a principally sectarian purpose and had the primary effect of advancing and endorsing religion. *Id.* at 1482-88. The Third Circuit concurred with the reasoning of *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995).

In *Harris*, the high school senior class decided by majority vote whether to include invocation and benediction during graduation ceremonies and, if so, who would deliver them. 441 F.3d at 452-53. The Ninth Circuit rejected the reasoning of *Jones* (upon which the district court relied in this case); found pervasive state involvement in the speech resulting from its policy despite arguments that the student referenda transformed the issue into a private speech; and concluded that the intent and primary effect of the state policy at issue was to advance religion in an environment coercive of students. *Id.* at 454-58.

The Ninth Circuit also subsequently rendered an opinion arguably in some degree of tension with *Harris*. However, that court's decision in *Doe v. Madison Sch. Dist. No.*

321, 147 F.3d 832 (9th Cir. 1988), *vacated and dismissed*, 177 F.3d 789 (9th Cir. 1999), upheld a policy that the Ninth Circuit panel deemed more neutral than any of the other policies reviewed by the Courts of Appeals. In *Madison Sch. Dist.*, the policy allowed for the selection of four speakers solely on the basis of their academic standing, even if the practice resulted in prayer at graduation, and the court concluded that academic standing was a neutral selection criterion.[6] 147 F.3d at 835. As a result of these decisions, a clear conflict among the circuits exists with regard to the issue of student-led prayer at public high school graduation ceremonies, and disparate conclusions on this important issue will persist throughout the nation absent review by the Court. Accordingly, the Court should review the decision of the Court of Appeals in this case.

Since 1993, respondents have conducted student referenda to elect speakers to deliver "messages," not to exceed two minutes, near the beginning and end of public high school graduation exercises. The duration and placement of this opportunity for a single elected student to speak is fully consistent with the tradition of invocations and benedictions at Duval County graduations, App. 47a, 250 F.3d at 1350 (Carnes, J., dissenting), which the district court described as traditionally and historically "familiar if not expected." App. 246a n.9; *Adler I*, 851 F.Supp. at 453 n.9. The record is replete with evidence of explicitly labeled invocations and benedictions, most often delivered by class "chaplains" elected to give the "messages" pursuant to the policy, with directions that students and the audience stand for these parts of the programs. *See* App. 262a-266a. Like policies of a number of public school districts around the nation, respondents' policy seeks to evade *Lee* by unconstitutionally

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[6]Respondents' high school graduations, as is common generally, include addresses by class valedictorians (and at times also by the salutatorians), but respondents additionally promulgated their "Graduation Prayers" policy with a different selection method and for a different purpose.

delegating to student majorities decisions that respondents could not constitutionally make themselves.

The record demonstrates that in the policy's first year, 1993, the "messages" delivered pursuant to the policy were prayers at ten of Duval County's 17 public high schools. App. 21a, 45a. *Adler V*, 250 F.3d at 1339; *id.* at 1349 (Carnes, J., dissenting) ("approximately sixty percent of the times when the policy has been applied, it has resulted in student-led prayer at graduation. Sixty percent is not perfection, but it is close enough for government work, and Duval County's 'Graduation Prayers' policy is government work."). The record information for more recent years, mostly in the form of graduation programs printed by the various high schools, indicates an overwhelming prevalence of prayer or other religious messages during the times reserved for the policy's student "messages." *See* App. 262a-266a. Of the 62 messages indicated in this portion of the record, 58 either were titled "invocation" or "benediction" or were delivered by a student "chaplain," or both; only four lacked a clear indication of religious intent or content.[7]

The respondents' policy is entitled "GRADUATION PRAYERS."[8] The preamble to the policy

> recall[s] that after the 1992 Supreme Court case of *Lee v. Wiseman* [sic], you received a memorandum from me instructing that because of the decision, we would no longer

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[7]Even with seemingly neutral criteria, the state cannot remain "studiously oblivious to the effects of its actions" impinging Establishment Clause. *Santa Fe*, 530 U.S. at 307, n.21.

[8]While not controlling over the text, titles are "tools available for the resolution of a doubt." *Brotherhood of R.R. Trainmen v. Baltimore & O .R. Co.*, 331 U.S. 519, 526 (1947).

> be able to have prayers at graduation ceremonies. Most of you have recently been bombarded, as have I, regarding whether or not student initiated and led prayers are acceptable based on a recent Fifth Circuit opinion.... The key to the *Lee v. Wiseman* [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance....

App. 267a. On its face, the premise of the policy, its very purpose, is the furtherance of prayer at graduation through implementation by students. The "messages" authorized by the policy are limited to two minutes in length, at the beginning and/or end of the ceremonies, times uniquely suited and historically devoted to the traditional invocations and benedictions. *See* App. 38a, 47a; *Adler V*, 250 F.3d at 1346 (Kravitch, J., dissenting); *id.* at 1350 (Carnes, J., dissenting). Also, those in attendance are requested in school-printed programs to stand for these messages, further evidence of coercion and endorsement.

Respondents faced threats of lawsuits from both sides–"not about whether there would be student participation or a student message in general, but about whether there would be prayer." App. 47a; *Id.* at 1350 (Carnes, J., dissenting). The school board's response was

> to pass the buck to the senior class.... [I]n that way a majority of the senior class determines whether its message will be prayer. The school board policy not just permits but invites that determination by the majority regardless of the views of the minority. As

> whether its message will be prayer. The school board policy not just permits but invites that determination by the majority regardless of the views of the minority. As interpreted in *Santa Fe,* the Establishment Clause forbids that type of exercise of majority power. Government is not allowed to aid in the establishment of religion by giving a majority of students a proxy to use government power to do that which government itself may not do.

App. 47a-48a; *id.* at 1350 (Carnes, J., dissenting); *see also, Santa Fe,* 530 U.S. at 305-12.

* * *

The majority of the Court of Appeals failed to apply the Court's clear holdings in *Santa Fe* to the record facts of this case. The court below based its judgment on immaterial distinctions between this case and *Santa Fe,* and ignored *Santa Fe*'s command to accord proper consideration to the history and context of the respondents' policy. By so doing, the Court of Appeals fosters further conflict among the circuits by encouraging recurrence of similar policies and of the issue raised in this petition. For these reasons, the Court should grant review in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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